RIGHTS STUFF

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When Does Leave Become "Indefinite?"

Arlene Moore began working for Patuxent Institution as a correctional officer in the summer of 1993. She received satisfactory performance evaluations for the next 17 years.

In October 2009, she was diagnosed with Stage III breast cancer. The facility granted her a medical leave beginning in November. By December, she had used up all of her paid leave. Co-workers generously donated their paid leave to her, and she was granted paid leave through the summer of 2010.

At some point, Moore's supervisor urged her to apply for medical disability retirement. She said she wanted to return to work when she was finished with her medical treatment. Moore was told that effective August 4, 2010, she would be on unpaid leave. She said her co-workers were told not to donate any more leave to her.

On August 5, Moore's doctor said she could return to work. She called the facility and said she planned to return to work on August 13. But on August 9, she was told that she had been fired on August 4, 2010. She was told she could reapply for a position and file for unemployment benefits. She won unemployment benefits, and she was hired for a similar job at a different facility in December, 2010. She sued, alleging disability discrimination in employment in violation of the Americans with Disabilities Act.

Patuxent argued that Moore wanted an indefinite medical leave and that an indefinite medical leave is not a reasonable accommodation under the ADA. Courts have said that indefinite leaves are not required by the ADA, but temporary leaves of absence may be. The Court in this case said that "Whether Ms. Moore's eight-month absence from her job to receive cancer treatment was a reasonable accommodation under the ADA, or amounted to an 'indefinite leave of absence' that imposed an undue hardship on the State, is a factual question that cannot be answered at this stage." The Court noted that Moore's doctor had cleared her to work just one day after she was terminated. The Court remanded the case back to Trial Court to decide the factual question.

The case is Moore v. Maryland Department of Public Safety and Correctional Services, Patuxent Institution, 2011 WL 4101139 (D.Ct. MD 2011).

If you have questions about your rights and responsibilities under the ADA, please contact the BHRC.

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Woman Wins Part of Sex Discrimination Complaint

Susan King began working for Acosta Sales and Marketing, a food broker, in 2001. Her job was business manager, meaning she represented a group of producers. She quit in 2007 and charged Acosta with two kinds of sex discrimination: sexual harassment and unequal pay. She lost her harassment claim but won her unequal pay claim.

King said that her work environment at Acosta had been hostile. Her most obnoxious co-worker allegedly was Thomas Connelly. Between 2001 and 2004, he distributed pornographic materials at work. He showed her a picture of himself wearing only a trench coat, tight swimming trunks and a dildo. A few weeks later, Connelly gave King a pornographic video tape and a dildo. He called her a derogatory slang during a business meeting. At that point, she complained to her supervisor, who told Connelly to clean up his act. He never harassed her again; he quit the next year.

She experienced other harassment as well. A supervisor made a pass at her. Another called her "Susie Big Hair." This same supervisor called another female employee a "tramp" and a third female employee "Pass-Around Patti." At one point, a customer made a crude sexual comment in front of King and a supervisor; the supervisor did nothing. The Court said that "All of this may have been unpleasant, but none of it was severe, and a few incidents at the rate of one every four to six months . . . cannot be called pervasive. Once Connelly desisted, King's working environment was not marked by severe or pervasive hostility towards women."

The pay issue was more in King's favor. She showed that some men in the same job classification made more than twice her pay. All the men were paid more than all but one of the women, and that one woman took six years to achieve her pay ($60,000 a year). The men exceeded the $60,000 pay much faster than she did.

Acosta said that education and experience accounted for the higher salaries of the men. All of the men had college degrees and King did not. (The Court did not say if the other women had college degrees.) The Trial Court thought it was sufficient for Acosta to articulate education and experience as potentially explanatory variables; the Court of Appeals said they would have to prove their justification. The Court said that it might make sense for employers to offer a higher starting salary to applicants with college degrees and relevant experience. But after that, performance should be the determining factor. King had the best sales record and yet was not compensated accordingly.

It did not help matters that the general manager could not explain why the pay scales were so different. He just said the process was "subjective" without elaborating. Nor did it strenghen the company's case when at trial, Acosta's attorney said the salaries might have been set "haphazardly or irrationally." The Court said if that was the case, the pay for "men and women should have been jumbled together. It is difficult to see how every woman could be paid more than all but one woman, and why men received greater raises, if [the manager] were pulling numbers out of a jar."

The Court remanded the pay portion of the case for trial.

The case is King v. Acosta Sales and Marketing, Inc., 2012 EL 807199 (7th Cir. 2012). If you have questions about sex discrimination in employment, please contact the BHRC.

Primary Election Day is May 8!

How Much Information Does an Employer Need About an Employee's Illness?

Dillard's, a department store chain, was sued over its sick leave policy. Its policy required employees who needed time off for health-related reasons to provide a doctor's note stating "the nature of the absence (such as migraine, high blood pressure, etc.)." If the employee did not provide this information, her time off would not be excused.

Corina Scott was off work from May 29 until June 3, 2006. She gave her supervisor a note from her doctor saying she needed to be off work that week. The note did not give a reason. Her supervisor told her that her doctor had to also state the condition being treated. The supervisor said the doctor did not have to provide a specific diagnosis, but "just the nature of the illness" or the "nature of the absence." She said she needed to verify that Scott had a "legitimate medical reason for being unable to work." Scott did not provide the requested information; her absence was thus considered unexcused, and Dillard's terminated her employment. Other employees had similar stories. They filed disability discrimination complaints against Dillards.

The Americans with Disabilities Act provides that employers "shall not . . . make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." Dillard's was not able to show that it has a business reason for needing to know each employee's underlying medical condition. It said that it needed such information to be sure that the employee really needed the time off work. But it rescinded the policy in 2007. The Court said, "If the policy was indeed job-related and a matter of business necessity, Dillard's has failed to explain how it is now able to operate as a business without such a policy."

The Equal Employment Opportunity Commission sought punitive damages against Dillard's. The company said there was no evidence that it had operated "with malice or reckless indifference to the federally protected rights of an aggrieved individual." Thus, punitive damages should not be awarded. The Court said that all the EEOC had to show was that Dillard's followed a discriminatory practice "in the face of a perceived risk that its actions will violate federal law." At least one employee told Dillard's that its policy might violate the law. Dillard's provided no evidence that it had investigated whether its policy was lawful or not.

May Your Employer Require You to Provide Your Facebook Password?

In March, the AP reported that some employers are asking job applicants for their password so they may access the applicants' Facebook or other social media pages. Facebook has said that doing so may get the employer into legal trouble, particularly if the applicant's page reveals membership in a legally-protected category such as their religion or sexual orientation. A spokesperson for Facebook said that "While we do not have any immediate plans to take legal action against any specific employers, we look forward to engaging with policy makers and other stakeholders, to help better safeguard the privacy of our users."

Now Congress is asking the Justice Department to look into whether such requests for passwords violate the Stored Communications Act or the Computer Fraud and Abuse Act. Some senators are drafting a bill to fill in gaps that are not covered by current law. And at least two states - California and Massachusetts - are considering legislation that would bar employers from requiring such information from applicants or employees.

Until these issues are resolved, it might be a good idea to review your social media pages before applying for a job.

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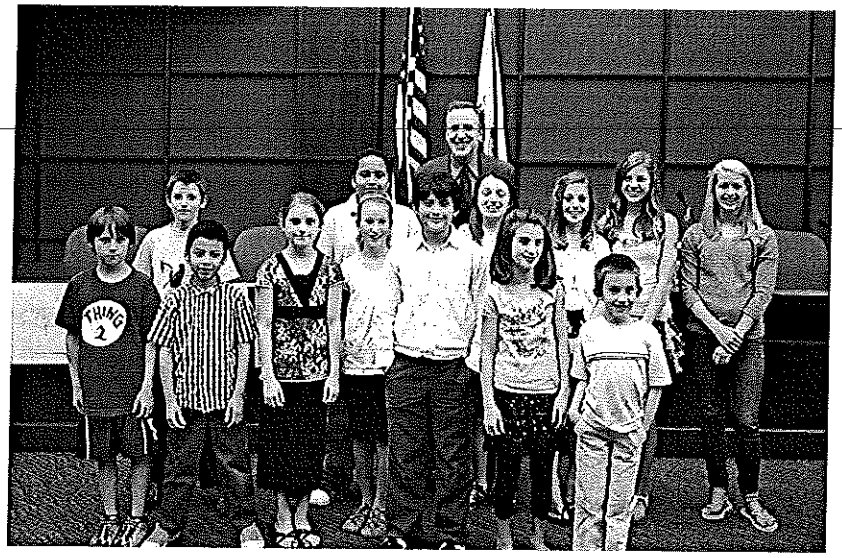
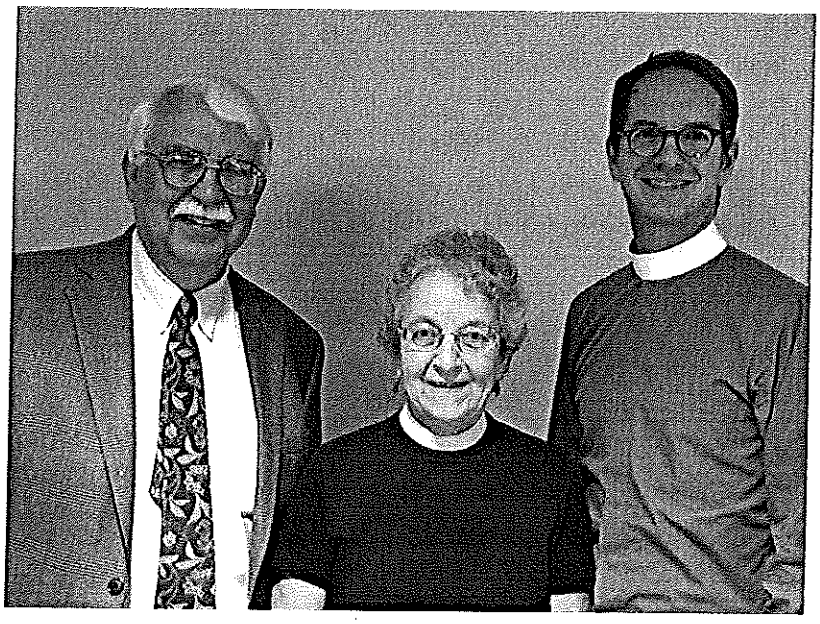


Mayor Mark Kruzan poses with the winners of the Bloomington Human Rights Commission's 21st annual essay/art contest at an awards ceremony on April 3. The theme this year was "What I've Learned From People Different Than Me."

This year's winners in the essay division, first through fourth grades were first place, Ada Lynch, University; second place, Annabelle Thomassen, University; third place, Andrew Swank, Rogers. The essay winners in the fifth through eighth grades were first place, Mari Walter-Bailey, Batchelor; second place, Sydnie Lynn Cunningham, Lakeview; third place, Allison VanLeeuwen, Lakeview.

The art winners in the first through fourth grades were first place, Quinn Wilson, University; second place, Salem Akhras, Childs; third place, Simon Moore, Childs and honorable mention, Diego Smith, University. The art winners at the fifth through eighth grade level were first place, Noah Moore, University; second place, Caitlyn Betar, Lakeview and third place, Tyler Shay, Lakeview. Congratulations to all of these students.



BHRC Commissioner Byron Bangert poses with the winners of the 2011 Human Rights Award, Virginia Hall and Charlie Dupree. They were chosen for their work with Trinity Episcopal church, where Dupree has been the Senior Pastor since the fall of 2008. Hall has been the Assistant Rector at Trinity for five years.

The Human Rights Awards honor individuals or groups who have made specific and significant contributions to improving civil rights, human relations or civility in our community. The BHRC is pleased to recognize these two for their work in promoting social justice in our community.